In the Supreme Court of Missouri

No. 84415

IN THE MATTER OF THE LIQUIDATION OF PROFESSIONAL MEDICAL INSURANCE CO. and PROFESSIONAL MUTUAL INSURANCE CO. RISK RETENTION GROUP:

ARNOLD J. WOLF, D.P.M., ARTHUR AXELBANK, M.D., and JONATHAN E. KLEIN, M.D.,

Appellants,

v.

A.W. MCPHERSON, DEPUTY DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Lee E. Wells, Judge

SUBSTITUTE BRIEF OF APPELLANTS

Martin M. Meyers, #29524
mmeyers@meyerslaw.com
THE MEYERS LAW FIRM, LC
222 West Gregory Boulevard, Suite 340
Kansas City, Missouri 64114
(816) 444-8500
(816) 444-8508 *facsimile*

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Circuit Court of Jackson County, Missouri on December 20, 2000, denying Relators' motion for leave to intervene, denying Relators' application for appointment of trustees and approving an interim distribution of $21,000,000. The case does not involve the Constitution of the United States or the State of Missouri, nor does it otherwise fall within the exclusive jurisdiction of the Missouri Supreme Court. Original jurisdiction of this appeal therefore was vested in the

Missouri Court of Appeals, Western District, pursuant to Article V, Section 3 of the Missouri Constitution of 1945, as amended. The Court of Appeals, Western District, entered its Order and Memorandum Opinion on February 13, 2002. Upon application by appellants, this Court ordered transfer after opinion. Jurisdiction to order transfer after opinion and to hear this appeal the same as on original appeal is vested in the Supreme Court pursuant to Article V, Section 10 of the Missouri Constitution of 1945, as amended.

STATEMENT OF FACTS

The Missouri Court of Appeals, Western District heard two prior appeals arising out these liquidation proceedings — WD 55915 and WD 57950. The former decision is reported at *State ex rel. Angoff v. Wells*, 987 S.W.2d 411 (Mo. App. W.D. 1999). The latter appeal was decided by *per curiam* Order issued October 31, 2000, pursuant to *Supreme Court Rule 84.16(b).* The memorandum accompanying the Order details many of the facts pertinent to this petition. A copy of the memorandum issued in this related case is attached to this Substitute Brief of Appellants as an Appendix and the references thereto will be in the form A#. In addition, appellants here, at the time they filed their Notice of Appeal, also filed a Petition for Writ of Prohibition or, in the Alternative for Writ of Mandamus — WD 59437. The petition was denied without opinion.

Professional Mutual Insurance Company Risk Retention Group ("RRG") is a domestic mutual insurance company that was formed in 1987 to provide medical malpractice insurance coverage to its member physicians. (A2). Member physicians paid premiums and were required to make surplus contributions to capital of the company. (A2). Glenn Jourdon was elected president and CEO, and was a director of RRG, but was never a member of the company. (A2). Prior to joining RRG, Jourdon worked for the department of insurance for some 26 years, serving as its chief financial examiner. (Transcript of October 30, 2000, hearing, p. 19). In 1990, Jourdon formed Professional Medical Insurance Company ("Pro Med"), a stock property and casualty company and RRG contributed two million dollars of its surplus to Pro Med in return for which it received 800,000 shares of Pro Med common stock. (A3). Jourdon also served as a director and president of Pro Med. (A3).

In 1991, RRG sold for two million dollars all of its common stock in Pro Med to CIC, a holding

company of which Jourdon was the sole shareholder. (A3). CIC borrowed the two million dollars from Pro Med. (A3). ***R.S.Mo. § 379.080.2(b)*** requires that any investment by a domestic stock insurer in a loan must secured by personal property with a cash market value at least twenty percent of the amount of the loan thereon and because Pro Med loaned CIC 100% of the purchase price of the stock, either this section was violated or RRG received twenty percent less for the stock than it was worth.

At the time Jourdon, through CIC, purchased the Pro Med stock from RRG: there was no validly elected board of directors of RRG who could consent to the sale (L.F. 31-32[1]); there was no independent appraisal of the value of RRG's stock in Pro Med (L.F. 32); Jourdon knew there was confusion and uncertainty among the policyholders of RRG and Pro Med about who owned and who had the right to vote on the affairs of RRG and Pro Med from and after January 1, 1990 (L.F. 31); the boards were told, incorrectly, that the money for the stock purchase would come from an outside source (L.F. 32); there was no disclosure of Jourdon's conflict of interest or the extent to which he would benefit individually from the transaction (L.F. 33); the demands of one director that independent representation and advice be obtained before the transaction was approved were ignored, causing said director to resign for fear of incurring personal liability as a result of the stock purchase transaction. (L.F. 33).

In 1992, CIC sold 416,000 of its 800,000 Pro Med shares to the ESOP for $1,078,7886. CIC's $2 million note to Pro Med was canceled and replaced by a note from ESOP for $1,078,786.89 and a note from CIC for $960,000. (L.F. 2). At the time Pro Med was placed in receivership both notes were in default, with CIC owing $760,000 on its $960,000 note to Pro Med and ESOP owing $943,426.30 on

[1]References to L.F. are to the Supplemental (Corrected) Legal File.

its note to Pro Med. (L.F. 2-3).

At the same time the loans were made, CIC entered into an agency agreement with Pro Med pursuant to which CIC received a fifteen percent commission on every policy sold by Pro Med. (A3). Thus, neither Jourdon nor CIC invested a single dollar of their own money to obtain Pro Med's stock from RRG. CIC/Jourdon used the doctors' money to buy the doctors' stock and repaid the load with the doctors' money. (A3). After the defaults on the loans from Pro Me, neither Pro Med nor the Receiver ever took any steps to foreclose on the Pro Med stock held by CIC or the ESOP. (L.F. 2).

In April 1994, both RRG and Pro Med were declared insolvent and A.W. McPherson ("Receiver"), deputy director of the Missouri Department of Insurance, was appointed Receiver for both companies.[2] (A5).

In February 1999, Receiver acting in his capacity as Receiver for Pro Med issued a Memo setting forth his determination as to how the surplus of Pro Med, remaining after payment of Class 2 through 8 creditors should be distributed. (L.F. 1). In the Memo, the Receiver determined that 48% of the Pro Med surplus should be paid to CIC and 52% should be paid to the participants of the Pro Med ESOP. (L.F. 2). The Memo recounted many of the facts set forth above. (L.F. 2-3). However, the Memo contained no analysis of whether, in the Receiver's opinion RRG, and indirectly it member doctors, had viable claims

[2] Scott Lakin has since been named Director of the Department of Insurance and therefore became the Receiver of both receiverships pursuant to ***R.S.Mo. § 375.954***.

against Pro Med, CIC/Jourdon and the ESOP due to the circumstances surrounding RRG's surrendering its stock ownership in Pro Med. (L.F. 1-6). Neither did the Memo disclose or discuss why the Receiver in his capacity as Receiver for RRG did not assert any claim against the Pro Med estate relating to the transaction whereby RRG gave up its ownership interest in Pro Med. (L.F. 1-6). Likewise, there was no disclosure of or discussion regarding Receiver's conflict of interest that would allow the Court to determine the extent to which the Receiver's decision not to pursue such a claim on behalf of RRG may have been tainted by the Receiver's conflict of interest in serving as the Receiver of both receivership estates. (L.F. 1-6). Finally, the only person representing RRG's members to receive the Receiver's Memo was the Receiver himself — none of the doctors, including appellants, was provided a copy of the Memo at the time it was written. (L.F. 1-6).

Pursuant to an order by Judge Wells dated June 24, 1999, an interim distribution of sixteen million dollars ($16,000,000) was made from the Pro Med estate to "shareholders" (class 9 creditors) of which CIC received 48%, or $7.68 Million on its $200,000 investment paid with "commissions" obtained from Pro Med in spite of its default on the loan. (L.F. 7).

In September 1999, Receiver filed an application for approval of his determination that any amounts remaining in the RRG estate after payment of Class 1 through 8 creditors should be distributed to RRG members, including appellants. (A5). When Jourdon learned that the RRG surplus would go to the RRG members, he attempted to purchase from the RRG members their interests in the RRG surplus for a fraction of their value. (L.F. 11-12). The Receiver sought a temporary restraining order to prevent Jourdon from using his superior knowledge regarding the proposed RRG distribution to the detriment of the RRG members (L.F. 9).

As a result of Jourdon's actions in September, Doctors sought legal counsel to protect their rights in the receivership. (Transcript of December 20, 2000 hearing, p. 14). Thereafter, Appellant Wolf filed a motion seeking intervention in October 1999. (L.F. 22). That motion was not ruled upon. In June 2000, Appellants Klein and Axelbank joined appellant Wolf in a filing a supplemental motion to intervene. (L.F. 26). A hearing was held on October 30, 2000, at which the Receiver stated he did not object to appellants intervening in the action but did object to appellants' petition to the extent that it questioned who owned the stock of Pro Med. (Transcript of October 30, 2000, hearing, p. 17). Specifically, the attorney for the Receiver stated:

> We are not going to go back and start from square one and start trying to figure out who owns the stock. Was it a proper transaction for the stock to be sold in the first place to CIC? That's something we took a look at and at the end of the day decided the stock resides where it does and those stockholders had that interest in ProMed . . .

Id. At the same hearing, counsel for the Receiver acknowledged that the Receiver has an obligation to report conflicts of interest to the Court under ***R.S.Mo. § 375.710***, and proceeded to tell the Court:

> Frankly, I find myself or the Receiver finds himself in a possible conflict of interest here. Yes, the department did approve these transactions. Mr. Jourdon worked for the department for some 26 years as the chief financial examiner. The department was involved in ruling on certain transactions back and forth and now to the extent that the doctors turn to the liquidator and say, Are you protecting our interest? Have you done everything you can to proceed? I'm going to tell them, No, we are not going to pursue that.

(Transcript of October 30, 2000, hearing, p. 19).

Another hearing was held in November 1999 regarding the motions during which the trial court suggested that the Doctors and the Receiver get together to discuss whether the Receiver could assign the claims to movants and the RRG doctors who could then pursue them outside the receivership estate. (Transcript of November 13, 2000, hearing, p. 20-22). Negotiations thereafter between the Doctors and the Receiver proved unsuccessful and revealed to Doctors the existence and extent of the actual conflict of interest on the part of Receiver in attempting to act on behalf of separate receivership estates that had obviously conflicting interests. (Transcript of December 20, 2000 hearing, pp. 15-16). Accordingly, on December 19, 2000, acting pursuant to ***R.S.Mo. § 375.710***, Doctors filed an application for appointment of trustees, asking the Court to fashion a remedy for the conflict of interest on the part of the Receiver. (L.F. 78). A hearing was held on December 20, 2000, during the course of which the trial court denied the Doctors' motions to intervene and refused to appoint trustees or otherwise investigate or remedy the Receiver's conflict of interest. At that hearing the trial court was asked to clarify whether he was making a finding that no conflict of interest existed on the part of the Receiver or if he was refusing to look at that question. (Transcript of December 20, 2000, hearing, p. 30). The trial judge responded that he was not making any finding on the issue of conflict of interest and "I am not going to make it." *Id*. The trial court also approved the Receiver's request to distribute another $21 million to CIC/Jourdon and the ESOP, as shareholders of Pro Med. (L.F. 82).

The Doctors filed a Petition for Writ of Prohibition or, in the Alternative, for Writ of Mandamus with this court (WD59437) which was denied without opinion. This appeal was filed at the same time. (L.F. 84).

POINTS RELIED ON AND AUTHORITIES

I. THE TRIAL COURT ERRED IN DENYING THE DOCTORS' MOTION TO INTERVENE OF RIGHT PURSUANT TO SUPREME COURT RULE 52.12(a) BECAUSE THE FACTS CONTAINED IN THE DOCTORS' MOTION AND PROPOSED PETITION IN INTERVENTION ESTABLISHED THE THREE ELEMENTS WHICH MANDATE INTERVENTION — (1) AN INTEREST IN THE SUBJECT MATTER; (2) THAT DISPOSITION OF THE ACTION MAY IMPEDE THE ABILITY OF THE APPLICANT TO PROTECT THAT INTEREST; AND (3) THAT APPLICANTS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES — IN THAT THE RECEIVER REFUSED TO PROTECT THE DOCTORS' INTERESTS BY PURSUING THE CLAIMS AGAINST JOURDON AND CIC AND SUCH INTERESTS COULD NOT BE ADEQUATELY PROTECTED BY THE DOCTORS TAKING AN ASSIGNMENT FROM THE RECEIVER AND PURSUING THE CLAIMS OUTSIDE OF THE RECEIVERSHIP PROCEEDING BECAUSE NOT ALL OF THE DOCTORS' CLAIMS CAN BE LEGALLY PURSUED THROUGH SUCH AN ASSIGNMENT AND BECAUSE DISTRIBUTING THE BULK OF THE SURPLUS OF THE PRO MED ESTATE TO JOURDON/CIC BEFORE THE DOCTORS' CLAIMS TO THAT SURPLUS COULD BE HEARD DRASTICALLY IMPAIRS THE DOCTORS' ABILITY AS A PRACTICAL MATTER TO RECOVER THOSE FUNDS BACK FROM JOURDON/CIC

Ainsworth v. Old Security Life Insurance Company, 694 S.W.2d 838 (Mo. App. W.D. 1985)

(*"Ainsworth II"*)

Ainsworth v. Old Security Life Insurance Company, 685 S.W.2d 583, 586 (Mo. App. 1985)(*"Ainsworth I"*)

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976)

State ex rel Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122 (Mo. 2000)

Supreme Court Rule 52.12

Supreme Court Rule 52.09

R.S.Mo. § 375.1188

II. THE TRIAL COURT ERRED IN REFUSING TO APPOINT THE DOCTORS, OR OTHER SUITABLE INDIVIDUALS AS TRUSTEES FOR THE PURPOSE OF RECEIVING AN ASSIGNMENT OF CLAIMS FROM THE RECEIVER BECAUSE THE DOCTORS HAD AN INTEREST IN THE PROCEEDINGS AND FILED AN APPLICATION FOR APPOINTMENT OF TRUSTEES IN THAT THE TRIAL COURT HAD AN ABSOLUTE DUTY UNDER *R.S.MO. § 375.710* TO EVALUATE THE CONFLICT OF INTEREST ISSUE RAISED BY THE DOCTORS AND TAKE APPROPRIATE REMEDIAL ACTION TO PROTECT THE DOCTORS' INTERESTS.

Carmack v. Missouri Department of Agriculture, 31 S.W.3d 40, 46 (Mo. App. W.D. 2000)

Redpath v. Missouri Highway and Transp. Com'n, 14 S.W.3d 34 (Mo. App. W.D. 1999)

State ex rel. Angoff v. Wells, 987 S.W.2d 411 (Mo. App. W.D. 1999)

Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373 (Mo. App. E.D. 2000)

R.S.Mo. § 375.710

R.S.Mo. § 375.1176

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DOCTORS' MOTION TO INTERVENE OF RIGHT PURSUANT TO SUPREME COURT RULE 52.12(a) BECAUSE THE FACTS CONTAINED IN THE DOCTORS' MOTION AND PROPOSED PETITION IN INTERVENTION ESTABLISHED THE THREE ELEMENTS WHICH MANDATE INTERVENTION — (1) AN INTEREST IN THE SUBJECT MATTER; (2) THAT DISPOSITION OF THE ACTION MAY IMPEDE THE ABILITY OF THE APPLICANT TO PROTECT THAT INTEREST; AND (3) THAT APPLICANTS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES — IN THAT THE RECEIVER REFUSED TO PROTECT THE DOCTORS' INTERESTS BY PURSUING THE CLAIMS AGAINST JOURDON AND CIC AND SUCH INTERESTS COULD NOT BE ADEQUATELY PROTECTED BY THE DOCTORS TAKING AN ASSIGNMENT FROM THE RECEIVER AND PURSUING THE CLAIMS OUTSIDE OF THE RECEIVERSHIP PROCEEDING BECAUSE NOT ALL OF THE DOCTORS' CLAIMS CAN BE LEGALLY PURSUED THROUGH SUCH AN ASSIGNMENT AND BECAUSE DISTRIBUTING THE BULK OF THE SURPLUS OF THE PRO MED ESTATE TO JOURDON/CIC BEFORE THE DOCTORS' CLAIMS TO THAT SURPLUS COULD BE HEARD DRASTICALLY IMPAIRS THE DOCTORS' ABILITY AS A PRACTICAL MATTER TO RECOVER THOSE FUNDS BACK FROM JOURDON/CIC

1. Standard of Review

The standard for reviewing a trial court's denial of a motion seeking intervention of right under ***Supreme Court Rule 52.12*** is found in ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo. 1976). ***State ex rel Nixon v. American Tobacco Co., Inc.,*** 34 S.W.3d 122, 126 (Mo. 2000). Accordingly, the judgment of the trial court denying the Doctors' motion to intervene must be reversed if it erroneously declares or applies the law. ***Id.*** While the burden is on the proposed intervenors to show all the elements required for intervention as of right, when the applicant does so the right to intervene becomes absolute and the motion to intervene may not be denied. ***Id.*** at 127.

2. The Doctors Demonstrated Each of the Elements Entitling an Intervenor to Intervention of Right

Supreme Court Rule 52.12(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The case law uniformly interprets this subsection as creating three separate elements, each of which must be established to intervene as a matter of right: (1) an interest in the subject matter; (2) a disposition of the action that may impede the ability of the applicant to protect that interest; and (3) that the applicant's interests are not adequately represented by the existing parties. *See e.g.,* ***LeChien v. St. Louis Concessions, Inc.,*** 33 S.W.3d 602, 603(Mo. App. E.D. 2000). As stated above, when an applicant

satisfies these elements, the right to intervene is absolute and the motion to intervene may not be denied. ***State ex rel Nixon v. American Tobacco Company, Inc***., 34 S.W.3d 122, 127 (Mo. 2000).

1. The Doctors Established an Interest in the Property Administered by the Receivership.

An interest is a concern, which is more than mere curiosity, or academic or sentimental desire. ***In re C.G.L.,*** 28 S.W.3d 502, 504 (Mo. App. S.D. 2000). One interested in an action is one who is concerned in the outcome or result thereof because he has a legal right which will be directly affected thereby . . . by the judgment or decree in such action. ***In the Matter of Trapp,*** 593 S.W.2d 193, 204 (Mo. banc 1980). The interest must be such an immediate and direct claim upon the very subject matter of the action that the intervenor will either gain or lose by the direct operation of the judgment that may be rendered therein. ***In re C.G.L.,*** 28 S.W.3d at 505.

The Doctors established such an interest both in the property which was being administered by the receivership estate and in the claims which they sought to assert through intervention.

In the decision rendered in case number WD 57950, the Missouri Court of Appeals for the Western District affirmed the trial court's order affirming the RRG Receiver's determination that the RRG members, including appellants here, are entitled to any assets remaining in the RRG estate after satisfaction of the Class 2 through 7 claims. (A6-A7, A16). Because each of the appellants will gain by direct operation of any judgment obtained on the claims that they seek to assert by intervention, appellants have the interest required by ***Rule 52.12(a)***. ***Ainsworth v. Old Security Life Insurance Company,*** 694 S.W.2d 838, 840 (Mo. App. W.D. 1985) (***"Ainsworth II"***)(there is no doubt that shareholder of corporation in receivership had a direct and immediate interest in the "property or transaction which is the

subject of the action.").

In their proposed petition, the Doctors set forth a claim pursuant to ***Supreme Court Rule 52.09*** as a shareholder derivative action by and on behalf of the members of RRG against RRG itself in the first instance. Because RRG itself was the sole shareholder of all of the issued and outstanding capital stock of Pro Med at the time of the transaction complained of, the Doctors' proposed petition asserts a derivative claim against Pro Med as well.

Both of the claims of the Doctors are premised on the fraudulent conduct of Glenn Jourdon, who was president of both companies at the time of the transaction, and who ended up with all of the capital stock of Pro Med without paying a single dollar for it. If the Doctors are allowed to intervene and if they succeed on the derivative claims which they propose to assert, each of the three individual doctors would gain by direct operation of the judgment in that by virtue of their entitlement to receive the remaining assets of the RRG estate, each would receive a percentage of any recovery to RRG on the claims set forth in the proposed petition.

At the time of the proposed intervention, Jourdon, through his shell corporation CIC, had already been paid $7.68 million and, after the Doctors' motion was denied, he was paid another $10.5 million. The sums distributed represent the partial payment for the value of the capital stock of Pro Med, which stock the Doctors claim is rightfully owned by RRG, the original stockholder of Pro Med.

Both in ***Ainsworth v. Old Security Life Insurance Company,*** 685 S.W.2d 583, 586 (Mo. App. 1985)(***"Ainsworth I"***) and ***Ainsworth v. Old Security Life Insurance Company,*** 694 S.W.2d 838, 841 (Mo. App. W.D. 1985) (***"Ainsworth II"***), the court held that intervention in particular proceedings in which the receiver may be involved should be allowed with "considerable liberality." Here,

the Doctors seek to intervene solely with respect to "a particular proceeding in which the receiver may be involved." The only difference between the particular proceeding here and the one in ***Ainsworth II*** , is that appellants here are seeking to commence a proceeding which the Receiver, due to an undisclosed and therefore unremediated conflict of interest, has failed and refused to commence. Only intervention will protect the interest the Doctors have in the claim against Jourdon and CIC that the Receiver refuses to pursue.

2. The Doctors Established that Disposition of the Action Absent Their Intervention Impedes Their Ability to Protect Their Interest

As discussed above, the Doctors' claim is in the nature of a shareholder derivative action. It is well-established in corporate law that shareholders must normally bring a derivative action in order to file a cause of action against an officer or director. ***Centerre Bank of Kansas City, National Association v. Angle***, 976 S.W.2d 608, 613 (Mo. App. W.D. 1998). This is because the fiduciary duty of the officer or director runs to the corporation as a whole, and not to individual shareholders. ***Id.*** In addition, allowing individual shareholders to bring multiple actions to recover their proportionate shares would lead to multiplicity of actions and the possibility of disproportionate recoveries; to avoid these and similar problems, Missouri requires such suits be brought on behalf of the corporation. ***Id.*** Finally, requiring such claims to be asserted as derivative actions protects creditors by ensuring that the recovery goes to the corporation. ***Id.*** at 615.

In ***Ainsworth v. Old Security Life Insurance Company,*** 685 S.W.2d 583, 587 (Mo. App. W.D. 1985)(***"Ainsworth I"***), the court specifically suggested that the appropriate remedy under similar circumstances would be a "stockholders derivative action for the assertion of claims improperly failed to be asserted by the corporation (represented by the receiver)."

Because RRG and Pro Med would be necessary parties/defendants in connection with the Doctors' derivative claims in the absence of a receivership, the Receiver in his dual capacity as Receiver for both parties is obviously a necessary party given the pendency of a receivership. ***R.S.Mo. Section 375.1188*** prohibits suits against the liquidator or the insurer outside of the liquidation proceeding, such that the Doctors have no legal right to assert their claims other than by means of intervention in the receivership

proceeding to assert the claims. ***State ex. rel. Melahn v. Romines***, 815 S.W.2d 92, 94 (Mo. App.1991). The Insurance Code has been held to confer exclusive subject matter jurisdiction to hear claims against a receivership upon the court supervising the liquidation of the insurance company in the receivership proceeding. ***Medallion Ins. Co. v. Wartenbee***, 568 S.W.2d 599, 601 (Mo. App. 1978). The Doctors were and are accordingly legally prohibited from pursuing their claims outside of the receivership. The legal prohibition against the Doctors pursuing their claims outside of the receivership in and of itself establishes the second element necessary to show entitlement to intervention of right, i.e, that disposition of the action absent their intervention impedes their ability to protect their interest.

3. The Doctors' Interests Are Not Adequately Represented by the Existing Parties

The third element that must be established before a party becomes entitled to intervention of right under ***Rule 52.12(a)*** is that the applicants' interests are not adequately represented by the existing parties. There can be no reasonable dispute about whether this element has been established. The Receiver of RRG utterly failed in his duty to RRG and its members to make claim against Pro Med, Jourdon and CIC in order to recover RRG's ownership interest in Pro Med. One apparent reason for the Receiver's failure is his obvious conflict of interest — the same individual serves as the Receiver of both the RRG and Pro Med receivership estates such that the Receiver would have to engage in the unlikely act of suing himself in order to assert the claims raised by the Doctors.

Jourdon and CIC also argued to the trial court that the Department of Insurance approved the fraudulent transaction by which he ended up owning approximately one-half of ProMed without paying anything for his interest. (Transcript of October 30, 2000, hearing, p.12). In light of this assertion, the

Receiver had another conflict of interest – the RRG Receiver's refusal to pursue the claim to the stock of ProMed may have been colored by the Receiver's interest in avoiding scrutiny of the role, if any, the Department of Insurance played in the fraudulent transaction. This is particularly true in light of the fact that Jourdon worked at the Department of Insurance for many years alongside the very individuals who presumably made the decision not to challenge the transaction whereby Jourdon became a multi-millionaire at the expense of those to whom he owed a fiduciary relationship. This multifaceted conflict of interest on the part of the RRG Receiver rendered the Receiver unwilling or unable to adequately represent the interests of the RRG members in connection with the assertion of the claim to the ProMed stock. There can be no serious argument that the RRG Receiver was adequately representing the interests of appellants in connection with this claim. In fact, counsel for the Receiver candidly admitted as much when he stated at the October 30, 2000 hearing that: "to the extent that the doctors turn to the liquidator and say, Are you protecting our interest? Have you done everything you can to proceed? I'm going to tell them, No, we are not going to pursue that."

Because the Doctors established each of the elements necessary to establish their entitlement to intervention as a matter of right, their right to intervene became absolute and trial court necessarily erred in denying intervention. ***State ex rel Nixon v. American Tobacco Company, Inc***., 34 S.W.3d at 127. Therefore, the order denying intervention must be reversed because it erroneously declared or applied the law. ***Murphy v. Carron***, 536 S.W.2d at 32.

3. The Trial Court Erroneously Concluded that The Doctors' Interests Could be Adequately Protected by Taking an Assignment from the Receiver and Pursuing Claims Against Jourdon and CIC, only, Outside of the Receivership

The transcript of the December 20, 2000, hearing at which the trial court finally denied the Doctors' motion for leave to intervene (which had been pending for almost 14 months) and the Doctors' supplemental motion to intervene (which had been pending for almost seven months) reflects that Judge Wells erroneously believed the claims were more properly characterized as claims against Jourdon and CIC as individuals rather than claims of a derivative nature that needed to be pursued against the two receiverships. (Transcript of December 20, 2000, hearing, p. 30). Judge Wells' reasoning that the claims could or should be pursued elsewhere runs counter to the major purpose of Rule 52.12 which is "to facilitate the determination of all related disputes in one proceeding, and thereby avoid a multiplicity of actions." ***Maries County Bank v. Hoertel,*** 941 S.W.2d 806, 810 (Mo. App. S.D. 1997). It is this the accomplishment of this primary objective which requires the rule to be liberally construed so as to permit broad intervention. ***Id.***

Furthermore, Jourdon's dual capacity as president of both RRG and Pro Med at the time he personally acquired (through his corporation, CIC) the stock of Pro Med from RRG violated fiduciary duties running both to Pro Med and to CIC. (L.F. 33, ¶ 17). Assuming that the assignment by the RRG Receiver of RRG claims against Jourdon and CIC permits the Doctors to pursue claims for breach of fiduciary duties owed to RRG, it does not permit the Doctors to pursue claims for breach by Jourdon of his separate fiduciary duties owed to Pro Med. The Doctors' proposed petition asserted these claims (L.F. 33, ¶ 17). In addition, under the terms of the assignment tendered by Receiver, Receiver reserved the right to withdraw the assignment at a later date (Transcript of December 20, 2000 hearing, pp. 17-18), making the assignment wholly illusory.

Finally, assuming that Judge Wells was correct in concluding as a matter of law that an action

originally derivative in nature could be pursued based on an assignment from the company that would be a defendant in a derivative action,[3] which appears to be at best an unsettled legal question, and ignoring the fact that the claims for breach of fiduciary duties owed to Pro Med were not assigned, the stark fact remains that the Doctors' ability to protect their interests are nonetheless drastically impaired "as a practical matter" by distributing the Pro Med funds to Jourdon/CIC to be dissipated before the Doctors' claim of right to those funds can be adjudicated.

The Doctors established all of the essential elements entitling them to intervention of right to assert their derivative claims against RRG and Pro Med, as well as Jourdon and CIC such that the trial court erred as a matter of law in denying intervention. This Court should reverse that order and remand to the trial court with instructions to grant the Doctors leave to intervene and assert the claims in their proposed petition.

II. THE TRIAL COURT ERRED IN REFUSING TO APPOINT THE DOCTORS, OR OTHER SUITABLE INDIVIDUALS AS TRUSTEES FOR THE PURPOSE OF RECEIVING AN ASSIGNMENT OF CLAIMS FROM THE RECEIVER BECAUSE THE DOCTORS HAD AN INTEREST IN THE PROCEEDINGS AND FILED AN APPLICATION FOR APPOINTMENT OF TRUSTEES IN THAT THE TRIAL COURT HAD AN

[3] Jourdon and CIC have not conceded that such an action can be pursued against them directly. In fact, they filed an amicus curie brief in the Court of Appeals, challenging the validity of the assignment.

ABSOLUTE DUTY UNDER *R.S.Mo. § 375.710* TO EVALUATE THE CONFLICT OF INTEREST ISSUE RAISED BY THE DOCTORS AND TAKE APPROPRIATE REMEDIAL ACTION TO PROTECT THE DOCTORS' INTERESTS .

1. Standard of Review

The standard of review where the appellate court is reviewing questions of law is *de novo*. ***Carmack v. Missouri Department of Agriculture,*** 31 S.W.3d 40, 46 (Mo. App. W.D. 2000).

2. Argument

Under the Missouri Insurance Code there is no discretion vested in the trial court as to the identity of the receiver — by statutory mandate the Director of the Department of Insurance must be appointed the receiver of any domestic insurance company placed in liquidation. ***R.S.Mo. § 375.1176; State ex rel. Angoff v. Wells,*** 987 S.W.2d 411, 413-14 (Mo. App. W.D. 1999). Obviously, where the Director of the Department of Insurance is the mandatory Receiver of every insurance company placed in receivership, the potential for conflicts of interest on the part of the Director acting on behalf of different insurers is foreseeable. The Missouri Insurance Code anticipates, and provides a remedial procedure for, such conflicts of interest.

R.S.Mo. § 375.710 provides as follows:

Conflict of interests--power of court--trustees

In case of any conflict of interests on any matter, or concerning the enforcement or settlement of any conflicting claims between two or more insurers, the settlement and winding up of whose affairs shall be under the charge of the director, it shall be the duty of the director, and the right of any person interested in any of the insurers to report the fact

> of conflict and the question or questions involved to the court in which any of the causes is pending, and such court, thereupon, shall have power to appoint a trustee, to have charge and control of the interests of any of the insurers as regards the settlement or enforcement of its claims in respect to the matter in controversy, or to make such other orders providing for the settlement, adjustment or enforcement of the rights of the insurer in the matter as to the court shall seem best adapted to the protection of the rights of all.

Under this statutory provision, the duty of the Receiver to report a conflict of interest to the Court is *mandatory*. In his argument at the hearing on December 20, 2000, the Receiver did not deny that a conflict of interest existed and continued to exist on the part of the Receiver with respect to the decision whether to pursue a derivative claim against Pro Med, Jourdon and CIC on behalf of the RRG estate; instead, the Receiver contended that such a conflict of interest was reported to the trial court "in a manner." (Transcript of December 20, 2000 hearing, p. 32). The reporting of the conflict was alleged to have been made in the Receiver's February 4, 2000, Memo proposing a plan of distribution. (Transcript of December 20, 2000 hearing, p. 33). A review of such Memo reveals that while it does describe in detail a proposed plan of distribution, it contains no disclosure of the Receiver's having identified claims by one estate against the other, nor does it seek or obtain permission from the Court not to abandon or fail to pursue such claims. (L.F. 1-6).

There are no published opinions interpreting or construing ***R.S.Mo. § 375.710.*** However, generally, where a statute uses words that have a definite and well-known meaning at common law, courts will presume that the terms are used in the sense in which they were understood at common law unless it clearly appears that such construction was not so intended. ***Redpath v. Missouri Highway and Transp.***

Com'n, 14 S.W.3d 34, 40-41 (Mo. App. W.D. 1999).

The concepts of conflict of interest and disclosure are well known at common law, both in terms of the duties of attorneys and also in terms of the duties of corporate officers. In both cases, the law is clear that *full disclosure* of the nature and extent of a conflict of interest is required before the party having the authority to waive or the ability to remedy the conflict of interest can do so. ***Zakibe v. Ahrens & McCarron, Inc.,*** 28 S.W.3d 373, 384 (Mo. App. E.D. 2000)(before corporation can enter into a transaction with an officer or director, such conflict of interest must be authorized by disinterested directors or shareholders who have received *full disclosure*); ***State v. Chandler***, 698 S.W.2d 844, 847 (Mo. 1985)(upon *full disclosure*, the trial judge could have determined whether defendant had waived his right to the assistance of an attorney unhindered by a conflict of interest).

The mandatory reporting requirement of ***R.S.Mo. § 375.710*** and its remedial procedures are the *only* protection provided by the Insurance Code to protect against the danger of conflicting interests where the Director of Insurance has dual receiverships and there are conflicts between them. To hold that the mandatory reporting requirement can be satisfied indirectly in a "read between the lines" manner as urged by the Receiver is to eviscerate this statutory safeguard and to unleash the evils the statute is designed to prevent. The second argument made by the Receiver at the hearing was that whether or not there was disclosure does not matter because the statute vests the trial court with the trial court with the duty to fashion a remedy for the conflict of interest. (Transcript of December 20, 2000 hearing, p. 33). Therefore, the Receiver argued, since the Court approved the plan of distribution in the absence of full disclosure of the conflict of interest, that same plan of distribution is a suitable remedy for the conflict of interest that was never disclosed. (Transcript of December 20, 2000 hearing, p. 33). The adoption of this cynical argument

— that *no disclosure* is the same as *full disclosure* — would be to reduce the trial judge's role to that of an unthinking functionary and, again, to eviscerate the only protection against such conflicts of interest contained in the Insurance Code.

There can be little doubt that Judge Wells' refusal to address the conflict of interest issue was due in part to the lateness with which the issue was raised. This lateness, however, is due in large part to the Receiver's failure to comply with his statutorily mandated duty to disclose the conflict of interest. Furthermore, had the Court timely granted the Doctors' motion to intervene, the conflict of interest issue would have been mooted by the Doctors pursuing within the receivership proceeding the very claims that the Receiver failed to pursue. Even if the Court had acted in a timely fashion to overrule the motion to intervene (which would have been erroneous, as shown by Point I above), the conflict of interest issue would and could have been presented to the Court for resolution promptly thereafter.

The third and final argument by the Receiver at the hearing in response to the motion to appoint trustees was that the Court of Appeals in its earlier memorandum opinion found there was no conflict of interest on the part of the Receiver because "as previously discussed Pro Med did not have a valid claim against the assets remaining in RRG after satisfaction of Class 2 through 8 claims." (Transcript of December 20, 2000 hearing, p. 38, *quoting* from A-13). The Court of Appeals' analysis in the memorandum opinion is sound — if as a matter of law a claim does not exist, there are no conflicting interest for the Receiver to resolve. Conflicts of interest arise when one or more viable options exist and the decision which option to select is tainted by a conflict between two competing interests.

In effect the Receiver's argument amounts to an argument that if Pro Med has no valid claim against RRG, then *ipso facto*, RRG cannot have had any valid claim against Pro Med, Jourdon and CIC. Such

an conclusion does not follow, either logically or legally. The Doctors have pleaded a viable derivative claim against Pro Med, Jourdon and CIC and that claim, unlike Jourdon's claim to the assets of RRG that he was allowed to assert through intervention and appeal to the Court of Appeals[4], has never been heard. The viability of these claims is not impugned or lessened by the fact that Jourdon's previously asserted claims on the part of Pro Med against the RRG receivership estate were determined to be without merit. While ***R.S.Mo. § 375.710*** grants discretion to the trial court as to the remedy to be fashioned in response to a conflict of interest, it does not grant the Court the discretion to simply ignore or refuse to look into the existence of an alleged conflict of interest. This was the response of Judge Wells to the motion for appointment of trustees. Because the existence of a conflict of interest has been demonstrated, the Court should either direct the trial court as to the response to be taken in response to the existence of the conflict or remand the case to the trial court with directions to consider the issue and fashion an appropriate remedy. In the meantime, the parties who received the interim distribution from the Pro Med estate should be

[4]Jourdon's pursuit of this claim delayed any distribution of funds from RRG to the doctors from September 1999 until February 2001. In contrast, Jourdon/CIC was paid almost 8 million dollars in June 1999. The trial court refused to delay the second distribution of an additional 10.5 million dollars to Jourdon/CIC until the Doctors' claims could be heard.

ordered to repay the amount of those distributions to the Pro Med estate.

CONCLUSION

There can be no question that the Receiver had and continues to have a clear and obvious conflicts of interest in connection with the decision to forego pursuing claims on behalf of RRG against Pro Med and others arising out of the circumstances pursuant to which the Pro Med stock was obtained from RRG. At a minimum, the Receiver would necessarily be both a plaintiff and a defendant if such a claim was asserted. This conflict would have been mooted had the trial court granted appellants' Supplemental Motion to Intervene as it should have done given the fact that since appellants demonstrated their entitlement to intervention of right. Failing that, at the very least the trial court should have appointed one or more trustees to pursue RRG's claims against Pro Med and others arising out of the stock sale transaction.

The Judgment of December 20, 2000 should be reversed and the cause should be remanded with directions to the trial court to grant appellants' Supplemental Motion to Intervene. Alternatively, the trial court should be directed to appoint one or more trustees to evaluate and pursue the claims on behalf of the RRG estate.